(10)

Dec 23 1999

No. 99-6615

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

In The

Supreme Court of the United States

MICHAEL WAYNE WILLIAMS,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Sussex I State Prison, Waverly, Virginia,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

*BARBARA L. HARTUNG
1001 E. Main St.,
Suite 504
Richmond, VA 23219
(804) 649-1088

JOHN H. BLUME
KEIR M. WEYBLE
1247 Sumter St.,
Suite 202
Columbia, SC 29201
(803) 765-1044

JAMES E. MOORE
CHRISTIAN & BARTON, L.L.P.
909 E. Main St., Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63pp

CAPITAL CASE

QUESTION PRESENTED

Whether 28 U.S.C. § 2254(e)(2), which prohibits a federal habeas court from holding an evidentiary hearing only "if the applicant has failed to develop the factual basis of a claim in State Court proceedings," governs petitioner's claims where throughout the state proceedings, the state suppressed the relevant facts, denied petitioner's discovery requests, denied all investigative and expert resources to investigate, develop, and discover claims, and denied an evidentiary hearing?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	20
ARGUMENT	22
CONCLUSION	50
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Aldridge v. United States, 283 U.S. 308 (1931) 47

Amadeo v. Zant, 486 U.S. 214 (1988) 23, 38, 39

Baja v. Ducharme, 187 F.3d 1075 (9th Cir. 1999) 26

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Brown v. Allen, 344 U.S. 443 (1953) 29

Burris v. Parke, 116 F.3d 256 (7th Cir.), *cert. denied*, 118 S. Ct. 462 (1997) 26, 37

Cardwell v. Greene, 152 F.3d 331 (4th Cir.), *cert. denied*, 119 S. Ct. 587 (1998) 26

Cheng v. Commonwealth, 393 S.E.2d 599 (Va. 1996) ..3. 41

Coleman v. Thompson, 501 U.S. 722 (1991) 37, 39

Crawford v. United States, 212 U.S. 183 (1909) 45

Dyer v. Calderon, 151 F.3d 970 (9th Cir.) (*in banc*), *cert. denied*, 119 S. Ct. 575 (1998) 46

Frye v. Commonwealth, 345 S.E.2d 267 (Va. 1986) ...3, 43

Imbler v. Pachtman, 424 U.S. 409 (1976) 31

In Re: Fred W. Greene, No. 98-17 (4th Cir. May 27, 1999) 17, 18

In Re Murchison, 349 U.S. 133 (1955) 47

Johnson v. Commonwealth, 255 S.E.2d 525 (Va. 1979) 3

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) ..... *passim*

Kyles v. Whitley, 514 U.S. 419 (1995) 34, 41, 43

Love v. Morton, 112 F.3d 131 (3rd Cir. 1997) 27

McCleskey v. Zant, 499 U.S. 467 (1991) 24

TABLE OF AUTHORITIES – Continued

Page

McDonald v. Johnson, 139 F.3d 1056 (5th Cir. 1998) 26

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) 45, 46, 47

Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998) 26

Molzof v. United States, 502 U.S. 301 (1992) 28

Murray v. Carrier, 477 U.S. 478 (1986) 23, 38, 39, 47

N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc., 453 U.S. 322 (1981) 28

Patton v. Yount, 467 U.S. 1025 (1984) 45

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993) 27

Reed v. Ross, 468 U.S. 1 (1984) 38

Smith v. Phillips, 455 U.S. 209 (1982) 45, 46, 47, 49

Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991) 45

Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991) 3, 31, 33, 40

Strickler v. Greene, 119 S. Ct. 1936 (1999) 22, 23, 38, 43, 48

Townsend v. Sain, 372 U.S. 293 (1963) 24

United States v. Bagley, 473 U.S. 667 (1985) 43

United States v. Frady, 456 U.S. 152 (1982) 23, 29

Wainwright v. Sykes, 433 U.S. 72 (1977) 22, 23, 24, 25, 37, 39

TABLE OF AUTHORITIES – Continued

Page

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202 (1997) 27

Weeks v. Bowersox, 119 F.3d 1342 (8th Cir. 1997) (*in banc*) *cert. denied*, 118 S. Ct. 887 (1998) 28

Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 852 (1999) 26

Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994), *cert. denied, Williams v. Virginia*, 515 U.S. 1161 (1995) 1, 2, 3, 4, 8, 42

Williams v. Netherland, 6 F. Supp. 2d 545 (E.D. Va. 1998) 18, 33

Williams v. Taylor, 189 F.3d 421 (4th Cir. 1999) ... *passim*

Zant v. Stephens, 462 U.S. 862 (1983) 44

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(e)(2) ..... *passim*

28 U.S.C. §§ 2261-2266 37

Va. Code § 8.01-654.1 ..... 10, 22

Va. Code § 18.2-31 3

Va. S. Ct. Rule 3A:14 44

CONSTITUTION

U.S. Const. amend. VI 1, 20

U.S. Const. amend. XIV 1

TABLE OF AUTHORITIES – Continued

Page

OTHER

Eric Partridge, Origins, A Short Etymological Dictionary of Modern English, (McMillan Co. 1966) 27

The Oxford English Dictionary, 2d ed. (1989)..... 27

The Random House Dictionary of the English Language, 2d ed. (1987)..... 27

Webster's Third New International Dictionary (1993) 27

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of Williams' petition for habeas corpus relief is reported as *Williams v. Taylor*, 189 F.3d 421 (4th Cir. 1999), and is found in the joint appendix at 651-671. The district court's opinion dismissing the petition is reported at 6 F. Supp. 2d 545 (E.D. Va. 1998), and is in the joint appendix at 638-646. The order of the court of appeals granting an emergency stay of the evidentiary hearing is unreported and is in the joint appendix at 635-637. The previous order of the district court granting Williams an evidentiary hearing is unreported and is in the joint appendix at 529-613. The Virginia Supreme Court's order dismissing Williams' state habeas petition is in the joint appendix at 444-445. The Virginia Supreme Court's opinion on direct review is reported as *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), *cert. denied*, 515 U.S. 1161 (1995).

JURISDICTION

The court of appeals' judgment was entered August 2, 1999. Rehearing and a suggestion for rehearing *en banc* were denied August 27, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury * * * [and] to be confronted with the witnesses against him * * * .

The case also involves the Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The case further involves 28 U.S.C. § 2254(e)(2), which states:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The Crime and the Issues for Trial

On February 27, 1993, Verena James drove petitioner Williams and Jeffrey Alan Cruse to a rural area of Cumberland County, Virginia. Both men were drunk; they intended to rob a store. Finding the store closed, they robbed the nearby house of Morris and Mary Keller. Mr. and Mrs. Keller were each shot several times and left for dead in a wooded area behind their home. Mrs. Keller was sexually assaulted. Several items were taken from the Keller house, which was set on fire. The Kellers' automobile was stolen. *Williams v. Commonwealth*, 450 S.E.2d 365, 369-70 (Va. 1994).

No one disputed these facts at Williams' trial. What was hotly contested was who – Cruse or Williams – had led the whole venture, raped Mrs. Keller, and fired the shots that killed Mr. and Mrs. Keller.[1] Each man insisted that he had fired only a single shot during the episode and that the remaining shots were fired by the other. This dispute was crucial because, under Virginia's definition of capital murder, only an individual who "actually fired the fatal shot" or shots is guilty of that crime and subject to a death sentence. *See* Va. Code § 18.2-31; *Cheng v. Commonwealth*, 393 S.E.2d 599, 607-08 (Va. 1996); *Johnson v. Commonwealth*, 255 S.E.2d 525, 530 (Va. 1979). Even in cases where two or more confederates shoot the victim or victims, as the testimony in this case established, a jury cannot find capital murder unless it determines beyond a reasonable doubt that the defendant took a "direct part in inflicting fatal injuries." *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991). Otherwise, the defendant can be convicted only of the lesser offense of first degree murder, which is not punishable by death. *Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986). As we discuss in detail below, the jury in Williams' case had, for all practical purposes, one and only one issue to decide: Was Michael Williams guilty of capital murder or of first degree murder?

The Investigation and Trial

On February 28, 1993, Verena James heard about the fire at the Kellers' house. She called local deputy sheriff Claude Meinhard and told him that "she had taken Williams and Cruse to an area not far from the house on the night of the fire." 450 S.E.2d at 370. Meinhard and another officer immediately went to question Cruse. JA 68. Cruse initially "furnished no information of value to the police, . . . [but] after the police discovered the bodies of the Kellers . . . Cruse consulted counsel." *Id.* at 370. Cruse's attorney negotiated an

[1] Williams was charged with five counts of capital murder and related offenses, and Cruse was charged with two counts of capital murder and related offenses.

agreement under which the Commonwealth would spare Cruse's life if Cruse gave a statement and testified against Michael Williams. "Cruse then furnished information that implicated both men in all the crimes charged, except for Cruse's role in Mrs. Keller's rape." *Id.* Cruse gave this statement on March 2, 1993. Subsequently, when forensic reports and other information obtained by the Commonwealth revealed that Cruse had failed "to tell the police that he had raped Mrs. Keller," the Commonwealth maintained that Cruse had breached the negotiated agreement. *Id.*

Prior to trial, Williams' counsel filed a *Brady v. Maryland*, 373 U.S. 83 (1963) motion specifically requesting, among other things, (1) information regarding any "confessions or statements" by Cruse, (2) "[a]ny and all consideration or promises of consideration given to" Cruse, whether "formal or informal," "direct or indirect," and (3) any "psychiatric, psychological and mental health records" relating to Cruse. JA 24-28. The trial court ordered the Commonwealth to produce any exculpatory information. JA 30.[2]

Williams' trial began on January 3, 1994. The medical examiner, Dr. Deborah Kay, testified that Mrs. Keller was shot three times in the face. JA 165. Dr. Kay was not able to determine the order of the shots, *id.*, but, in her opinion, all three of Mrs. Keller's wounds could have been lethal "in and of themselves, each individually." JA 184. Mr. Keller was shot five times. JA 174. Three shots were to the head, two of which passed through Mr. Keller's brain. JA 174-179.[3] In Dr. Kay's opinion, two of the wounds were "more serious in the

---

[2] In response to this order, the Commonwealth produced the following items: the investigative file including the summary of the investigation prepared by the state police; Cruse's criminal record; Cruse's statements to the police; Cruse's testimony at the preliminary hearing; and information regarding (but not a copy of) the revoked plea agreement with Cruse. JA 431. The materials that are the subject of Williams' present *Brady* claims were not included.

[3] Mr. Keller was also shot twice in the legs. JA 179-180.

sense that . . . they passed through the brain, so that those two are definitely potentially lethal," JA 186, but, as to the third wound, she "[could] not tell" if it was a fatal injury. JA 185.[4] Dr. Kay testified that if the wound which bypassed Mr. Keller's brain was the first shot, it would have been possible for him to move after receiving it. JA 179.

Cruse testified for the Commonwealth. He maintained that the idea to commit a robbery was Williams' and that Williams selected the Keller home. Cruse and Williams forced their way into the house after asking to use the phone. They were armed with a .357 Ruger Blackhawk pistol. Once inside, Cruse said, Williams dictated all their actions. JA 76-78, 85, 91, 96. Cruse searched the house and found a loaded .38 revolver and .38 bullets. JA 82-83.[5] Cruse and Williams had sex with Mrs. Keller. JA 93-94. After ransacking the house, they took the Kellers outside, "[d]own a dirt road and into a thicket." JA 99.

Cruse described what followed this way: Cruse was unaware of any plan to kill the Kellers until moments before the first shots were fired. JA 102. Williams said "we'll shoot at the count of three." JA 103. Williams shot Mr. Keller. Cruse didn't fire until Williams said "he didn't want to leave no witnesses." JA 103. Cruse shot Mrs. Keller and she "fell down." JA 104. Mr. Keller then stood back up and Williams shot him again. JA 104. As Williams and Cruse walked off, Williams said "what if they ain't dead?" and shot the Kellers "a couple more times apiece." JA 106.

Although Cruse stood indicted for two counts of capital murder and was guilty of capital murder by his own testimony (since he fired one of the three lethal shots at Mrs. Keller), Cruse asserted that there was no deal of any kind between him

---

[4] Dr. Kay testified that the third gunshot wound to the head contributed to Mr. Keller's death just as "any gunshot wound, even if it might not be lethal, . . . is contributory." JA 181.

[5] Cruse testified that he and Williams switched possession of the guns several times during the course of the evening. *See, e.g.*, JA 94; 108.

and the prosecution. On direct examination, cross, and redirect, Cruse maintained that he had no agreement with the Commonwealth about his sentence and that he was receiving nothing in exchange for his testimony. JA 135; 159.

Williams testified in his own defense, directly contradicting Cruse's account of the robbery, sexual assault and homicides. He said that Cruse had actively participated in the decision to commit the robbery and was not simply Williams' meek follower. Cruse, not Williams, had raped Mrs. Keller.[6] Cruse, not Williams, had said they should murder the Kellers to eliminate them as witnesses. JA 231-232. Williams admitted his part in the robbery and arson but testified that he had fired only one shot that night. He fired the first shot at Mr. Keller, using the .38 caliber pistol; Mr. Keller got up after that shot; then Cruse walked forward and shot Mr. Keller several times. JA 226-233; 245.

Williams' defense to the capital murder indictment was straightforward: Cruse was lying; Williams fired only one shot; that shot was not fatal. Williams was therefore guilty of first degree murder but not of capital murder. Relying on the medical examiner's testimony that one of the bullet wounds to Mr. Keller's head went through the facial bones and was not likely fatal in and of itself, Williams maintained that this was the shot he fired because Mr. Keller got up after Williams shot him. JA 233. The fatal shots to both victims thus came from Cruse. As defense counsel stated in summation: "our theory is . . . that Mr. Cruse fired all three shots that killed Mrs. Keller. . . . And . . . based upon the evidence that you

---

[6] The forensic tests were inconclusive. Dr. George Li, a forensic expert called by the Commonwealth, testified that "if this came from only one sperm source . . . then this type could only have come from Mr. Cruse and not Mr. Williams." JA 205; 207-208. If there was more than one donor of semen, then Li's test results were consistent with both Williams and Cruse. JA 206. Lisa Schiermeier, another forensic expert called by the Commonwealth, testified that a specific antigen "2-" could only have come from Williams. In Schiermeier's view, if there were more than one donor, Cruse could not be eliminated. JA 195.

see, when Mr. Keller stood up, that the wound that [the medical examiner] . . . said was possibly non-lethal . . . was the one that . . . Mr. Williams fired from the .38. . . . " JA 280. "And I submit to you that Mr. Cruse is lying. . . . Now I'm not suggesting to you that Mr. Williams is not guilty, that because of my scenario he walks, he gets off of murder. He's guilty of first degree murder on both counts." JA 280.

The Commonwealth's Attorney acknowledged that "the only dispute is about the rape and whether he is guilty of first degree murder or capital murder." JA 282. Thus, the prosecution's strategy was equally clear: bolster Cruse's testimony; undermine Williams' credibility. Accordingly, the Commonwealth vouched for Cruse's credibility because "[t]here is no agreement with Mr. Cruse. What he is doing is on his own. When this is over he goes to trial and faces the death penalty on two charges of capital murder." JA 265.[7] The other half of the Commonwealth's strategy was to stress that Williams had been present during the testimony of the other witnesses and so should not be believed. JA 237-239. This tactic started when the Commonwealth cross-examined Williams; it returned to this theme in summation:

> Williams sat right here – and he's got a right to do it – and he listened to everybody. Mr. Cruse didn't have that right to sit here and listen to everybody.

JA 272.

The trial court charged the jury on both capital murder and first degree murder. After deliberating for about four hours, the jurors convicted Williams on all counts, including capital murder.[8] JA 295-299.

---

[7] During its rebuttal argument, the Commonwealth again argued that Cruse's version of the crimes should be credited: "And like he told you right now, his back is against the wall; if he lies, he dies, and that is his situation." JA 284.

[8] At the sentencing phase, the Commonwealth presented – over trial counsel's objection – evidence that Williams was charged with four murders in a nearby county. Williams presented evidence that he had "no

A trial date was never set for Cruse. On March 14, 1994, several weeks after Williams was sentenced to death, Cruse pled guilty to the capital murder of Mrs. Keller and to the reduced charge of first degree murder of Mr. Keller. JA 401-414. At Cruse's sentencing hearing, the prosecutor urged the Court to spare Cruse's life because he had testified for the Commonwealth at Williams' trial. JA 418; 420. Cruse received a life sentence on April 26, 1994, JA 427, and is now incarcerated at an unknown location outside Virginia.

State habeas corpus proceedings

After Williams' convictions and death sentences were affirmed on direct appeal, *Williams v. Commonwealth*, 450 S.E.2d 365 (Va. 1994), he pursued state collateral remedies. Eric D. White was appointed to represent Williams in connection with the state habeas proceeding. White immediately set about to conduct an appropriate investigation, gather records, and interview witnesses in order to identify and present all available collateral claims for relief.

White sent a letter to Sheriff Meinhard on October 23, 1995, saying: "I would like to meet with members of your department who were involved in the investigation and who testified at [Williams'] . . . trial. I would also like to review the investigative files of those employees." JA 340. Sheriff Meinhard and his employees never responded to White's request and never provided him with the requested files.

---

prior convictions for violent crimes." 450 S.E.2d at 379. Evidence was also presented that Williams "suffered from . . . Attention Deficit Hyperactivity Disorder, which adversely affected him in school and limited his ability to function in society as he matured." *Id.* at 378. "[T]he effects of his disorder were exacerbated by his unstable home life and a sexual assault by an older man when Williams was 14 years old." *Id.* There was extensive testimony that Williams "was a caring, loving, generous and dependable person." *Id.* The jury found both the vileness and future-dangerousness aggravating circumstances and sentenced Williams to death. JA 333-334. On February 22, 1994, the trial judge imposed the death sentences. JA 337-338.

White also wrote to Warren Von Schuch, the lead trial prosecutor, and Donald Curry, the Senior Assistant Attorney General managing the litigation for the Commonwealth in the state habeas proceedings. White requested permission to review "all materials and evidence in the possession, custody or control of the Commonwealth or its agents" and specifically requested, *inter alia*:

> ◆ "All reports of physical or mental examinations . . . conducted in connection with the investigation of the offense, including but not limited to . . . all psychological tests . . . performed upon any prosecution witness";
>
> ◆ "Any and all such considerations or promises of consideration given during the course of the investigation and trial of this case by any law enforcement officials, including prosecutors or agents, police or informers, to or on behalf of any witness the prosecutor called at trial, or any such consideration or promises expected or hoped from any such witness at any future time. . . . ";
>
> ◆ "A copy of all medical or psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness' credibility, ability to perceive or ability to recall events."

JA 344-351.

Curry replied in a November 1, 1995, letter saying: "we have no intention . . . of [inspecting and reviewing the files] for the purpose of identifying, material, exculpatory evidence." JA 352. Curry stated two reasons for refusing to determine if the Commonwealth possessed such evidence. First, he recounted that Williams' trial counsel had "filed a lengthy request for exculpatory evidence prior to trial and the Commonwealth responded at that time." Second, "I know of no authority that requires the Commonwealth, as the respondent in a civil habeas proceeding, to comply with such a request from petitioner's counsel." *Id.*

On November 30, 1995, White filed a motion for expert services in the Virginia Supreme Court.[9] He specifically requested "an investigator to examine issues relating to the testimony and status of the co-defendant, Jeffrey Cruse, and issues relating to the jury's consideration of this case." JA 355. White told the court that he had been unable to locate Cruse to conduct an independent investigation into the accuracy of his testimony or the existence of any "plea negotiations, arrangements, discussions, meetings, etc. between the Commonwealth and petitioner's co-defendant, Jeffrey Cruse." JA 358. White also told the court that he needed the services of an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case . . . [to determine the existence of] irregularities, improprieties and omissions . . . with regard to the empanelment of the jury." *Id.*

The Commonwealth, again through Senior Assistant Attorney General Curry, opposed the motion for expert services, labeling the request for an investigator "frivolous." JA 367. After noting that the trial court had denied trial counsel's motion for an investigator, Curry maintained that the "Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the private lives of the jurors," since such a request "could be made by any prisoner in any case." JA 367-368. Curry also opposed funds for a ballistics expert, stating: "The issue in this case was not one of ballistics; rather it was a question of which defendant shot which victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury

---

[9] In Virginia, the state supreme court has exclusive jurisdiction over capital habeas petitions. Va. Code § 8.01-654(C)(1). The petition is filed in the Virginia Supreme Court, and that court determines in the first instance whether to grant funds for investigative and expert services, whether to grant discovery, and whether an evidentiary hearing is required. The circuit court can conduct an evidentiary hearing on such a petition "only if directed to do so by order of the Supreme Court." *Id.*

believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller." JA 366-367.

White tried other ways to obtain relevant information. On December 1, 1995, White again wrote to Curry and explained that he had been "unable to locate" Cruse. Cruse had been placed in protective custody, and the prison would not disclose his location. White went on to say: "I don't care where I speak to him but I think I am entitled to speak with him. I think I am also entitled to know the circumstances surrounding his entry into protective custody. I find it hard to believe that arrangements for this were not made prior to his testimony against my client." JA 362. Curry replied: "Cruse, in fact, is imprisoned outside Virginia. I will not reveal, however, his location to you or anyone else who might disclose the location to your client. . . . " JA 363.

White filed another motion in the Virginia Supreme Court on January 10, 1996, requesting the production of and discovery relating to Cruse. White informed the court that "the files of trial counsel and the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and . . . Cruse. Accordingly, counsel must talk to Mr. Cruse and obtain records relating to his incarceration." JA 372. Curry opposed the motion, asserting that Williams "is not entitled to discovery" and that the request was merely a "fishing expedition." JA 374-375. Curry also asserted that the "plea arrangements between the prosecution and Cruse were fully disclosed." JA 374.

In January 1996, White filed an amended state habeas petition asserting – among other claims not pertinent to the issues now before this Court – a claim that the Commonwealth had failed to reveal an agreement with Cruse.[10] White

---

[10] The state's response to the amended petition contained an affidavit from Cruse's attorney, Donald Blessing, and an affidavit from one of the

requested an evidentiary hearing, the right to conduct discovery, and funds to retain experts. JA 392.

On March 18, 1996, the Virginia Supreme Court dismissed Williams' state habeas petition without remanding the case for an evidentiary hearing or hearing oral argument. The court concluded that some claims were procedurally barred; as for the remaining claims, the court's entire discussion was: "finding no merit in petitioner's remaining allegations, the Court is of the opinion that the writ of habeas corpus should not issue as prayed for." JA 444-445. The court denied Williams' motions for investigative and expert services, for the production of Jeffrey Cruse, and for discovery relating to Jeffrey Cruse. *Id.*

Federal habeas corpus proceedings

1. The initial district court proceedings

On July 2, 1996, the United States District Court for the Eastern District of Virginia granted a stay of execution and appointed counsel. Pursuant to court order, counsel filed a habeas corpus petition on November 20, 1996. The petition re-raised Williams' *Brady* claim based on the Commonwealth's failure to disclose any formal or informal deals or arrangements with Cruse. It also contained several new claims that are relevant here.

First, it raised a new *Brady* claim based on counsel's discovery of an undisclosed pretrial, confidential report of a psychiatric examination of Cruse. The report, which was prepared in September 1993, several months prior to Williams' trial, stated:

---

two prosecutors, Robert Woodson, denying that any agreement existed. Von Schuch, the lead prosecutor who presented Cruse's testimony at trial and who told the jury "if he lies, he dies," did not submit an affidavit; nor did Cruse.

> [Cruse] has little recollection of [the Keller murders] . . . , other than vague memories, as he was intoxicated with alcohol and marijuana at the time.

JA 495. This report had been discovered in Cruse's court file by an investigator employed by appointed counsel, the Virginia Capital Representation Resource Center, during the federal habeas corpus proceedings. JA 620-621. Williams' state habeas counsel had reviewed Cruse's court file for the specific purpose of determining whether it contained information that shed light on the nature of the "deal" Cruse had with the Commonwealth or information that might be useful in attacking Cruse's credibility. According to state habeas counsel's affidavit, this psychiatric report was not in the file at the time he examined it prior to filing Williams' state habeas petition: "I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file. Given the contents of the report, I am confident that I would remember it." JA 625-626.

The federal habeas petition also asserted that Williams' Sixth and Fourteenth Amendment rights were violated when Bonnie Stinnett was seated as a juror. During the investigation conducted in connection with preparing the federal petition, counsel serendipitously discovered that Stinnett, the jury foreperson, had previously been married to Sheriff Meinhard,[11] who was the father of her four children. Meinhard was involved in the Keller investigation from the start;[12] he interviewed Cruse and testified at trial. Counsel also discovered

---

[11] Appointed federal habeas counsel, at their own expense, hired an investigator to interview the jurors who served in Mr. Williams' case. During the interviews, two jurors who knew Ms. Stinnett referred to her by her married name of "Meinhard." This fortuitous event initially revealed the relationship. JA 492-494.

[12] Meinhard received the call about a fire at the Keller home and went to the house. JA 67. He prepared the missing persons report and issued the BOLO for their stolen automobile. *Id.* Later that day, Verena James called Meinhard to say that she had dropped Cruse and Williams off near the Kellers' residence the night before. JA 68. Meinhard then picked Cruse up, brought him to the station, and interrogated him. *Id.*

that one of Williams' prosecutors, Robert Woodson, represented Stinnett in her divorce from Sheriff Meinhard. Both Stinnett and prosecutor Woodson had remained silent when the trial judge asked the following questions:

> ◆ "Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?" [Robert Woodson's name had been previously read to the jury.]
>
> ◆ "Are any of you involved in law enforcement?"
>
> ◆ "Are any of you related to the following people who may be called as witnesses . . . Deputy Sheriff Claude Meinhard?"

JA 33; 39-40.

On April 13, 1998, the district court dismissed most of Williams' claims but ordered an evidentiary hearing on the *Brady* claim involving the undisclosed deal with Cruse and the claims involving Stinnett, Meinhard and Woodson. With respect to Williams' contention that the prosecution failed "to disclose to the defense that Cruse did in fact have an agreement with the Commonwealth for a life sentence in exchange for his testimony against Williams," JA 575-576, the district court reviewed all of the circumstances of Cruse's testimony against Williams,[13] the subsequent reduction in Cruse's

---

[13] The district court noted the following testimony which was possibly suggestive of some type of arrangement:

> Q: You've indicated to the jury you're charged with capital murder right now; is that correct?
>
> A: Correct.
>
> Q: It is your understanding that the Judge is going to decide whether you live or die?
>
> A: Correct.

JA 159; 577-578. The court also referred to the following statement made by the Commonwealth's Attorney during his summation: "[Cruse] sits here today facing the death penalty; he sits here facing capital murder, two counts of capital murder. And like he told you right now his back is against the wall; if he lies, he dies, and that is his situation."

charges, the timing of Cruse's guilty plea,[14] the Commonwealth's recommendation that Cruse should be sentenced to life imprisonment as a result of his testimony at Williams' trial, and Cruse's centrality to the Commonwealth's case; on this basis, it concluded that "Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial. . . . " JA 577-580.[15] The court explained that "[h]ad the jury known that Cruse had some sort of agreement, understanding, or expectation with the Commonwealth regarding his sentence for the Keller murders, there is little doubt that their assessment of Cruse's credibility would have been affected." JA 580.

With respect to the Stinnett/Meinhard/Woodson claims, the district court ordered a hearing because:

> [t]here is no evidence that state habeas counsel knew or could have known of Juror Stinnett's relationship to Deputy Meinhard absent disclosure by the prosecutor. Because Prosecutor Woodson never notified the court or defense counsel of his prior representation of Deputy Meinhard or of his knowledge of Deputy Meinhard's relationship to Juror Stinnett, the Court finds that this information was not reasonably available to defense counsel and that they were unable to know of this issue.

---

[14] Cruse pled guilty to the capital murder of Mrs. Keller several weeks after Williams was sentenced to death. The capital murder charge arising from the death of Mr. Keller was reduced to first degree murder as a principal in the second degree.

[15] The Commonwealth submitted a second affidavit from Cruse's counsel, Blessing, in federal court in which Blessing stated that "[a]t the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth." JA 502.

JA 558. Thus the district court concluded that there was "cause and prejudice" to justify raising these claims for the first time in federal court. *Id.*[16]

The district court concluded that Williams was not entitled to an evidentiary hearing on his claim that the Commonwealth failed to disclose the psychiatric evaluation of Cruse. The court agreed with Williams that the "Commonwealth failed to provide this report to Williams' defense counsel- . . . despite being ordered to disclose all Brady material." JA 559. It agreed with Williams that "defense counsel were entitled to rely on the belief that the prosecution would comply with the Constitution." JA 560. It also agreed with Williams that "Cruse played a critical role in the Commonwealth's case against Williams" because the two men "offered dramatically different versions of the shootings." *Id.* Indeed, the district court believed that "Cruse's testimony on the triggerman issue and his credibility as a witness determined who would be convicted of capital murder." *Id.* And it

---

[16] The Commonwealth submitted an affidavit from Woodson stating that he "would not have expected [Stinnett] to say that she was 'related' to her ex-husband" because, in his opinion, "people who are related only by marriage are no longer 'related' once the marriage ends in divorce." JA 629-630. Woodson said he had no recollection of Stinnett having been asked if she was "related to any of the witnesses in the case." *Id.* Woodson also averred that he had "no recollection of having been involved as a private attorney in the divorce proceedings between Claude Meinhard and Bonnie Stinnett." *Id.* Stinnett submitted an affidavit stating: "I did not respond to the judge's question because I did not consider myself 'related' to Claude Meinhard in 1994. . . . Once our marriage ended in 1979, I was no longer related to him." JA 627-628. The affidavit recited: "I was also asked by the judge whether I or any member of my immediate family had ever been represented by any of the attorneys in the case. I did not respond to this question for several reasons. First, I do not think of myself as ever having been 'represented' by an attorney for any reason. When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson 'represented' either one of us." *Id.*

believed that information that "Cruse had little to no recollection of the murders would have undoubtedly undermined his credibility and cast doubt on his ability to remember the shootings with such detail." *Id.* However, the court ultimately denied Williams an evidentiary hearing because "Williams fails to explain to the Court how the report came to the attention of federal habeas counsel and why it could not have been previously discovered through the exercise of due diligence on the part of state habeas counsel." JA 560-561. Williams filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), attaching the affidavit of Eric White described above. The motion was denied without opinion. JA 633.

2. The Commonwealth's emergency stay proceedings

The Commonwealth immediately filed an Application for an Emergency Stay and a Petition for Writ of Mandamus and Prohibition in the Court of Appeals for the Fourth Circuit. On May 27, 1998, a divided three-judge panel granted the Commonwealth's motion, holding that the district court should apply 28 U.S.C. § 2254(e)(2)(A) and (B) to Williams' claims involving the deal with Cruse and the Stinnett/Meinhard/Woodson imbroglio. *In Re: Fred W. Greene,* No. 98-17 (4th Cir., May 27, 1998) (JA 635-636):

> [The Antiterrorism and Effective Death Penalty Act] establishes certain limits on a court's ability to conduct an evidentiary hearing where an applicant has failed to develop the factual basis of a claim in state court. In such cases, the court may hold an evidentiary hearing only if the claim satisfies two requirements. First, the claim must rely on either certain retroactive new rules of constitutional law or a "factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. sec. 2254(e)(2)(A). Second, the underlying facts must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would

> have found the applicant guilty of the underlying offense." *Id.* sec. 2254(e)(2)(B). In granting the evidentiary hearing, the district court did not apply these requirements. Instead it simply cited several pre-AEDPA cases to support its conclusion that defendant has demonstrated cause and prejudice. This, we believe, was error.

3. The remand proceedings in the district court

On remand, the district court expressed misgivings because the "plain meaning of section 2254(e)(2) prohibits a federal evidentiary hearing only in those cases where a petitioner has been afforded an opportunity to develop evidence in state habeas court but has failed to do so," *Williams v. Netherland*, 6 F. Supp. 2d 545, 547 (E.D. Va. 1998); and, in the district court's view, Williams "did not 'fail to develop' the factual basis of his claims," *id.* The court noted that

> [t]he record is replete with examples of state habeas counsel's numerous attempts to obtain the evidence required to discover, present, and prove Williams' claims – including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

JA. 643-644.

But "despite its concerns over the applicability of section 2254(e)(2) to cases such as the present one," the district court believed that it had "been directed by its Court of Appeals" to deny Williams an evidentiary hearing unless he could meet the exceptions contained in § 2254(e)(2)(A) and (B). JA 644. Finding that even if Williams could meet subsection (A)'s retroactive-new-law or new-factual-predicate requirements, he could not make the "requisite showing of innocence" under

subsection (B), the district court dismissed his petition without a hearing. JA 646.

4. The appeal to the Fourth Circuit

On appeal, Williams argued that he was entitled to a hearing on his claims. He maintained that § 2254(e)(2) comes into play only when a habeas petitioner " 'has failed to develop the factual basis of a claim in State court,' " *Williams v. Taylor*, 189 F.3d 421, 426 (4th Cir. 1999) (JA 658), and that *he* did not fail to develop facts; rather, "the Supreme Court of Virginia denied his requests for discovery, a hearing, and expert and investigative assistance." *Id.*

Concerning Williams' claim that the Commonwealth had concealed a testimonial deal with Cruse, the panel found that the state court correctly rejected this claim because, in state habeas, the "Commonwealth supplied two affidavits, one from Woodson and one from Cruse's trial counsel, Donald Blessing, stating unequivocally that Cruse had no agreement," JA 664, and "there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence." JA 665. The panel went on to say that even if Williams had demonstrated the existence of an agreement between Cruse and the Commonwealth, he could not show materiality in light of "Williams' own testimony that he was at least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head." JA 665-666.

As for Williams' *Brady* claim based on the Commonwealth's failure to disclose Cruse's psychiatric report, the panel found that Williams had failed to develop the factual basis of this claim in the state courts. "Williams provides nothing more than an affidavit from his state habeas counsel attesting to 'no recollection of seeing this report in Mr. Cruse's court file.' In light of the fact that Williams' federal habeas counsel located the evaluation in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence. Indeed, that failure tends to show that counsel did *not* act diligently." JA 660.

With regard to the Stinnett/Meinhard/Woodson claims, the panel concluded that Williams had failed to develop the facts supporting them in state court because "[t]he documents supporting Williams' . . . claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." JA 659. While acknowledging that Williams' request for an investigator to pursue exactly this type of claim was denied by the state courts, the panel found state habeas counsel's application insufficient because counsel "alluded vaguely to 'irregularities, improprieties and omissions' with regard to jury selection and asked for an investigator to examine 'all circumstances relating to the empanelment of the jury and the jury's consideration of the case.' " JA 659. In the Fourth Circuit's view, this request alone did not alert the "state habeas court to any specific claim" and thus "the failure to develop the . . . claim was . . . attributable to Williams, not to the Supreme Court of Virginia's rejection of a fishing expedition request." JA 659-660.[17]

SUMMARY OF ARGUMENT

Section 2254(e)(2), as amended by AEDPA, prohibits a federal district court from holding an evidentiary hearing only when "the applicant has failed to develop the factual basis of a claim in State court proceedings. . . . " The plain meaning of the statutory language, the unmistakable similarity between

[17] The panel also found that for essentially the same reasons, under "pre-AEDPA law . . . Williams can show neither cause nor prejudice from his failure to raise the aforementioned Sixth Amendment and Brady claims in state court." 189 F.3d at 427. On the issue of cause, the panel reiterated its "lack of diligence" discussion. On the issue of prejudice, the panel reiterated that, "[a]s we have indicated [in the § 2254(e) discussion], Williams' trial testimony alone was enough to convict him." *Id.*

the text of the statute and the language of *Keeney v. Tamayo-Reyes*, and the policies underlying AEDPA indicate that § 2254(e)(2) prevents a federal evidentiary hearing only where any inadequacies in the state court record are attributable to the petitioner.

Williams' state habeas counsel's diligent efforts to discover and develop facts supporting his claims during state habeas corpus proceedings were thwarted by the Commonwealth of Virginia: his formal and informal requests for discovery were rebuffed; his motions for investigative and expert assistance were denied; and the state court refused to conduct an evidentiary hearing. Because petitioner did all that can reasonably be expected to adequately develop the record, § 2254(e)(2) does not preclude a federal evidentiary hearing in this case.

For the same reasons petitioner did not "fail to develop" his claims in state court proceedings, *i.e.*, state interference, he has also established "cause" for the failure to present three of his four claims in state court. Furthermore, petitioner was prejudiced by each of the constitutional errors. The Commonwealth's nondisclosure of a psychiatric report showing Cruse had only vague recollections of the crimes deprived petitioner of material evidence undermining Cruse's testimony that petitioner had committed acts making him guilty of capital, rather than first-degree, murder. The prejudice was compounded by the prosecution's failure to reveal the existence of an agreement with Cruse. The silence of Juror Stinnett and Commonwealth Attorney Woodson likewise worked to petitioner's actual and substantial disadvantage by depriving him of the information necessary to challenge Stinnett for cause, or at the very least to remove her from the jury panel peremptorily, and by resulting in the seating in a capital trial of a jury foreperson who harbored actual bias.

ARGUMENT

A. Introduction.

The issue in this case is straightforward: Does 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, preclude a federal district court from holding an evidentiary hearing on four constitutional claims presented in Williams' petition for habeas corpus? The court of appeals said yes, concluding that Williams "failed to develop" the factual basis of his claims in state court, as that phrase is used in section 2254(e)(2). But this result flouts the plain language of the statute because the record is clear that Williams did all that he could reasonably be expected to do in state court, and that the state-court record was inadequate as a result of the prosecution's persistent concealment of information and the state court's persistent denial of Williams' requests for the resources necessary to unearth that information.

At the outset, Williams acknowledges that three of the four constitutional claims at issue were not raised in state court and thus are presumptively procedurally defaulted because they are time-barred. *See* Va. Code § 8.01-654.1. To obtain an adjudication of the merits of these claims in federal habeas, Williams must establish "cause and prejudice." *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Strickler v. Greene*, 119 S.Ct. 1936, 1949 (1999) ("[W]e must first decide whether that default is excused by an adequate showing of cause and prejudice."). Doctrinally, the *Sykes* issue is independent of the question of Williams' right to an evidentiary hearing under § 2254(e)(2). But the two issues became intertwined at an earlier stage of this case when the district court, finding "cause and prejudice," scheduled an evidentiary hearing on several of Williams' claims. The Commonwealth filed an "Application for Emergency Stay and Petition for a Writ of Mandamus and Prohibition" in the court of appeals, contending that § 2254(e) barred an evidentiary hearing. The court of appeals sustained that contention by referring to § 2254(e)(2);

and the subsequent course of the litigation was shaped by this turn.

In the following argument, Williams discusses the procedural default issue separately. He discusses the § 2254(e)(2) issue first, both because it was the basis of the court of appeals' decision below and because it applies to all four of Williams' claims, whereas procedural default applies to only three. Discussing § 2254(e)(2) first also proves economical, because the facts and reasoning by which Williams shows that he did not "fail to develop" the factual basis for his federal claims in state court will *a fortiori* establish "cause" for any procedural bar arising from the fact that three of his claims were raised initially in federal court.

As a framework for the detailed legal analysis that follows, Williams will briefly outline the principles that he believes govern procedural default and restrictions on federal evidentiary hearings when facts supporting federal claims are not developed in the state courts:

(1) *Sykes*' "cause and prejudice" test applies when a federal habeas petition contains claims that are procedurally barred under applicable state law because they were not previously raised in state court. "Cause" can take many forms, but generally falls into one of two broad categories: evidence that a factor external to the defense impeded the petitioner from presenting his or her claim pursuant to a State's rules, *Amadeo v. Zant*, 486 U.S. 214 (1988); or evidence that the petitioner's counsel rendered ineffective assistance by Sixth Amendment standards in failing to raise the claim, *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although "prejudice" has not been given "precise content," *United States v. Frady*, 456 U.S. 152, 168 (1982), it is generally understood to mean that the error worked to the petitioner's "actual and substantial disadvantage." *Id.* Where state misconduct is involved, prejudice is established by a showing that but for the misconduct, "there is a reasonable probability that [the] . . . conviction or sentence would have been different. . . . " *Strickler*, 119 S.Ct. at 1955.

(2) When a federal habeas petitioner who is entitled to an adjudication of a claim on the merits (either because s/he has exhausted and preserved the claim or because s/he has successfully overcome a procedural default of the claim) seeks to develop evidence that was not developed in state court, the applicable rule is provided by § 2254(e)(2). Prior to AEDPA, it was provided by *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *Keeney* qualified *Townsend* by holding that if the petitioner "failed" to develop the facts in state court, in the sense that s/he was at fault for the inadequate record, a hearing could not be conducted *unless* the petitioner demonstrated cause and prejudice. *Keeney*, 504 U.S. at 8.[18] "Cause" carried the same

[18] *Keeney* addressed "whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Tamayo-Reyes had been granted a hearing in state post-conviction proceedings on his claim that his guilty plea to manslaughter was invalid because his translator had not fully translated to him the *mens rea* element of the offense. In federal court, he again requested an evidentiary hearing, relying on the "fifth circumstance" of *Townsend v. Sain*, 372 U.S. 293 (1963), pursuant to which a habeas petitioner was entitled to a federal hearing if "the material facts were not adequately developed at the state-court hearing," *id.* at 313, so long as the petitioner had not deliberately bypassed available state-court procedures for fact development. *Id.* at 317.

Stressing Tamayo-Reyes' "negligent failure to develop the facts in state court proceedings," *id.* at 8-9, a majority of this Court overruled *Townsend*'s use of the "deliberate bypass" standard and adopted in its place the "cause and prejudice" requirement already applicable to habeas petitioners who failed to abide by state procedural rules, *Sykes*, *supra*, and those who committed abuse of the writ, *McCleskey v. Zant*, 499 U.S. 467 (1991). *Keeney*, 504 U.S. at 5-6; 6-7. In support of this partial restriction on the availability of federal evidentiary hearings, the Court observed that "encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance," and that "[i]t is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently

doctrinal meaning under *Keeney* as it does under *Sykes*. *Id.* at 10. In practice, however, "cause" in the *Keeney* context almost always took the form of ineffective assistance of counsel because the other major category of "cause" under *Sykes* – an external impediment – seldom, if ever, came into play under *Keeney*. (An external impediment would ordinarily exclude the circumstance that triggers a *Keeney* bar in the first place: the petitioner's "failure to develop the facts in state-court proceedings," *Keeney*, 504 U.S. at 11, through negligence or sandbagging.)

(3) AEDPA's § 2254(e)(2) works much the same way as *Keeney* but modifies *Keeney*'s exceptions. In place of the "cause and prejudice" required to overcome *Keeney*'s restrictions on the right to a federal evidentiary hearing, AEDPA requires a showing of *either* a new rule of constitutional law made retroactively applicable by this Court *or* newly discovered evidence not previously discoverable through the exercise of due diligence, ***and, in addition***, a showing of actual innocence by clear and convincing evidence. § 2254(e)(2)(A) and (B).

Williams acknowledges that this modification of *Keeney*'s exceptions would preclude an evidentiary hearing in his case if the exceptions were at issue. But they are not. The question in Williams' case is whether the case *falls within the rule of § 2254(e)(2) in the first place* on the ground that he "failed to develop" the facts supporting his claims in state court within the meaning of that language in the opening clause of § 2254(e). As Williams will now establish, he did not "fail" to do anything that he reasonably could have done in state court; the prosecution and the Virginia Supreme Court were responsible for the inadequacy of the state-court record;

failed to take advantage of opportunities in state-court proceedings." *Id.* at 9. Likewise, the Court explained that "[t]he state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Id.*

thus, § 2254(e)(2) does not bar Williams' right to a federal evidentiary hearing on his well-pleaded claims of constitutional violation.

B. A federal habeas petitioner has "failed to develop the factual basis of a claim" in state court only if s/he is at fault for the inadequate state-court record.

Section 2254(e)(2) provides that, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that [s/he comes within specified exceptions]." The federal courts of appeals have uniformly concluded that this is not a strict-liability statute but bars a federal evidentiary hearing only if inadequate factual development in state-court proceedings is attributable to some failing on the part of the petitioner.[19]

---

[19] *See Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999), *quoting Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) ("We agree that 'where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court' "); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998) ("where, as here, a habeas petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, § 2254(e)(2) does not apply"); *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) ("an applicant 'fail[s]' to develop the evidence supporting a claim only if he or she relinquishes an opportunity to introduce evidence or neglects to seek such an opportunity"); *Wilkins v. Bowersox*, 145 F.3d 1006, 1016 n.6 (8th Cir. 1998) (because lack of factual development in state court was not attributable to petitioner, court of appeals did not need to reach question whether § 2254(e), as amended, applied to this pre-AEDPA case); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998) ("a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission"); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997) ("Section 2254(e)(2) . . . applies only when 'the applicant has failed to develop the factual basis of a claim in State court proceedings.' 'Failure' implies omission – a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity."); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir. 1997) ("we are unwilling to conclude that [petitioner] failed to develop the factual basis of his claim in the state court proceedings. We conclude that factors other than the defendant's action prevented a factual record from being developed").

This reading is compelled both by the plain meaning of the statute and by the unmistakable resemblance of the statute to the language employed by this Court in *Keeney*. Because § 2254(e)(2) begins with a conditional "if" clause, the section's restriction upon federal evidentiary hearings turns upon the meaning of "failed" in this clause: "If the applicant has **failed** to develop the factual basis of a claim. . . . " "Failed" is commonly defined as "leav[ing] some possible or expected action unperformed or some condition unachieved," Webster's Third New International Dictionary (1993) (def. h), "fall[ing] short of success in something expected," The Random House Dictionary of the English Language, 2d ed. (1987) (def. (1)1), and being "at fault," The Oxford English Dictionary, 2d ed. (1989) (def. III 11.a).[20] Applying this common understanding of "failed" to § 2254(e)(2) produces the unmistakable result[21] that the section comes into play only if a habeas petitioner neglected to take advantage of an available opportunity to develop the facts supporting his claims in state-court proceedings.

Moreover, Congress used the same phrase – "failed to develop" – to trigger § 2254(e)(2) as was used in *Keeney* to trigger the restriction on the right to a federal evidentiary

---

[20] "Fail" and "fault" have the same etymological root, the Latin "*fallere*." *See* Eric Partridge, Origins, A Short Etymological Dictionary of Modern English, p.97 (McMillan Co. 1966).

[21] "[W]ords in a statute are assumed to bear their 'ordinary, contemporary, common meaning,' " *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997), *quoting Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (additional quotation marks omitted).

hearing.[22] "Where Congress uses terms that have accumulated settled meaning . . . a court must infer . . . that Congress means to incorporate the established meanings of these terms." *N.L.R.B. v. Amax Coal Co., a Division of Amax, Inc.*, 453 U.S. 322, 329 (1981). In *Keeney*, this Court used the phrase "failed to develop" to describe the omissions of "a petitioner [who] has negligently failed to take advantage of opportunities [to develop facts] in state-court proceedings." *Keeney*, 504 U.S. at 9. There is nothing to indicate that Congress, enacting § 2254(e)(2) less than four years later, intended to deviate from the meaning attached to "failed to develop" in *Keeney*.[23] *See Weeks v. Bowersox*, 119 F.3d 1342, 1354 n.12 (8th Cir. 1997) ("Where omission of material facts from the state court record is attributable to the petitioner, the new Act both codifies and narrows the [*Keeney v.*] *Tamayo-Reyes* standard").

---

[22] The parallels between *Keeney* and § 2254(e)(2) are evident from the following chart:

A federal evidentiary hearing is barred if:	
Keeney v. Tamayo-Reyes	28 U.S.C. § 2254(e)(2)
the lack of factual development is a result of petitioner's "*failure to develop the facts in state-court proceedings. . . .*" 504 U.S. at 11.	"the applicant has *failed to develop the factual basis of a claim in State court proceedings. . . .*"

[23] *See Molzof v. United States*, 502 U.S. 301, 307 (1992) ("A cardinal rule of statutory construction holds that: '[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' ") (internal citation omitted).

C. Because the inadequate state-court record here is in no way attributable to Williams or his state habeas counsel, he did not "fail to develop" the factual basis of his claims in state court.

No plausible argument can be made that a habeas petitioner has failed to develop the factual basis of his claims in state court when relevant information is unconstitutionally concealed by prosecuting authorities and their ancillary agencies, and when requests for both discovery and the financial resources necessary to conduct an independent investigation are denied by the state courts. In such circumstances, there is " 'interference by [state] officials' " that makes it " 'impracticable' " to fully develop the claim. *Keeney*, 504 U.S. at 10, n.5, *quoting Brown v. Allen*, 344 U.S. 443, 486 (1953). And that is precisely what happened in Williams' case.

1. Efforts to develop the facts in state court

As related above, Williams requested a federal hearing on four claims: (1) the prosecution violated *Brady v. Maryland* when it did not reveal a psychiatric report impeaching Cruse's credibility; (2) the prosecution further violated *Brady* by not disclosing a deal with Cruse; (3) Williams' Sixth and Fourteenth Amendment rights were violated by Juror Stinnett's acceptance on the jury, in light of her undisclosed relationships to Deputy Sheriff Meinhard and Commonwealth's Attorney Woodson; and (4) the same rights were violated by Woodson's failure to disclose that Stinnett was his former client and had been married to Meinhard.

The trial record in this case revealed no indication that a psychiatric report existed which contained a statement by Cruse that he had only vague memories of the Kellers' murders. Nor was there any clue that Juror Stinnett, Commonwealth Attorney Woodson and Sheriff Meinhard had concealed their relationships with each other throughout the trial. Diligent state habeas counsel could not have been alerted to this information by reviewing the record.

Yet Williams' state habeas counsel, Eric White, did not rely solely on the trial record. White recognized his responsibility to independently investigate, discover and develop all potential constitutional claims of error for collateral relief. He made repeated attempts to do so. As the district court found:

> [t]he record is replete with examples of state habeas counsel's numerous attempts to obtain evidence required to discover, present, and prove Williams' claims – including informal attempts to resolve discovery matters between counsel which were repeatedly rebuffed. The state courts further denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record.

JA 643-644. White was faced at every turn with stonewalling by the Attorney General's office; and the state supreme court refused to provide him with any investigative resources, discovery or an evidentiary hearing.

For example, White wrote to prosecutor Von Schuch and Senior Assistant Attorney General Curry requesting "[a]ll reports of physical or mental examinations . . . performed upon any prosecution witnesses" and "cop[ies] of all medical or psychiatric reports known to the prosecutor concerning any witness the prosecutor called at trial which arguable [sic] affected the witness's credibility, ability to perceive, or relate or recall events." See page 9, *supra* Even the most parsimonious reading of these requests encompassed the Cruse psychiatric report. Instead of providing the information, Curry insisted that he had "no intention . . . of [reviewing the files] for the purpose of identifying material, exculpatory evidence." Curry justified this stance by pointing to the "lengthy request for exculpatory evidence" to which "the Commonwealth responded" prior to trial, and by stating that he was unaware of any "authority that requires the Commonwealth . . . to comply with such a request from petitioner's

counsel."[24] *Id.* Under these circumstances, what options were available to state habeas counsel other than to accept the Commonwealth's representation that it had fully complied with *Brady? See Strickler*, 119 S.Ct. at 1951 (given the Commonwealth's representation in state habeas proceedings that the petitioner had been provided with all information known to the prosecution, "petitioner had no basis for believing the Commonwealth had failed to comply with *Brady* at trial").

White's efforts to ascertain the existence of a deal between the Commonwealth and Cruse were similarly rebuffed. He specifically asked for "[a]ny and all . . . considerations or promises of consideration given . . . by any law enforcement officials . . . to or on behalf of any witness the prosecutor called at trial. . . . " *Id.* This request was summarily rejected by the Commonwealth. White then asked the Virginia Supreme Court for "an investigator to examine issues relating to the testimony and status of the co-defendant, Jeffrey Cruse . . . ," and informed the court that counsel's own efforts to locate and interview Cruse had been unsuccessful. The Commonwealth opposed this motion as "frivolous," and the motion was denied. White, still unsatisfied, wrote again to Curry saying that White was unable to locate Cruse because Cruse had been placed in protective custody and asserting that White was entitled to speak to Cruse to determine if Cruse had testified pursuant to any arrangement. Once again, Curry's answer was: "I will not reveal . . . [Cruse's] location to you or anyone else who might disclose the location to your client, Michael Williams." Still White persisted. He filed another motion in the Virginia Supreme Court requesting that

---

[24] Curry's second justification conflicts with this Court's recognition that, while the prosecutor's . . . duty to [disclose] all significant evidence suggestive of innocence or mitigation . . . is enforced [at trial] by the requirements of due process, . . . after a conviction the prosecutor also is bound by the ethics of his office" to disclose such information. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (citations omitted).

Cruse be produced and that counsel be provided with discovery materials related to Cruse. Using what information he had been able to glean, White informed the Virginia Supreme Court that "the files of trial counsel and the record in this case do not adequately reflect information or discovery relating to plea agreements between the Commonwealth and Jeffrey Allen Cruse," so that "counsel must talk to Cruse and obtain records relating to his incarceration." In keeping with the Commonwealth's unrelenting pattern of obstruction, Curry opposed White's request, labeling it a "fishing expedition," asserting that White was "not entitled to discovery," and representing that the "plea arrangements between the prosecution and Cruse were fully disclosed." White's motion was denied by the Virginia Supreme Court. What more could White have done to develop facts regarding a deal with Cruse?

White's attempts to investigate whether his client was tried by a fair, impartial jury met the same government interference. Responding to his motion to the Virginia Supreme Court for investigative services, the Commonwealth argued that the "Court certainly should not authorize the expenditure of taxpayer funds for an investigator to intrude upon the lives of the jurors." See page 10, *supra*. White, who lacked means to finance the investigation and who also lacked any personal ties to the local community that might have alerted him to the relationships between Juror Stinnett, Commonwealth Attorney Woodson, and Sheriff Meinhard, had no reasonable means of uncovering those relationships. It was only after two other jurors referred to Stinnett by her married name – Meinhard – in interviews with an investigator later hired by federal habeas counsel, that the facts about her relationships with the sheriff and prosecutor came out.

In sum, appointed state habeas counsel did all he could do – without good faith cooperation by the Commonwealth's attorneys, without discovery, without financial resources, without a state-court hearing and the accompanying subpoena power – to develop the relevant facts. The district court

recognized as much, observing that, "the Court is hard-pressed to find that Williams 'failed to develop the factual basis of his claims in State Court proceedings,' " *Williams*, 6 F. Supp. 2d at 547. The court of appeals, however, demanded more.

2. The court of appeals' distortions of § 2254(e)(2)

First, the Fourth Circuit faulted White for insufficient specificity in his requests for discovery and financial assistance, requiring that "a petitioner must tie his requests to his specific claims and state with some particularity the need for assistance." 189 F.3d at 426. But counsel in state habeas proceedings are not supposed to speculate.

> Mere speculation . . . is unlikely to establish good cause [under Virginia's rules] for a discovery request on collateral review. *Nor, in our opinion, should such suspicion suffice to impose a duty on counsel to advance a claim for which they have no evidentiary support.* . . . . The presumption, well established by " 'tradition and experience,' " that prosecutors have fully " 'discharged their official duties' " . . . is *inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.*

Strickler, 119 S.Ct. at 1950-51 (emphasis added).

Here, White reviewed the information available to him and inferred from it that a deal may have existed between Cruse and the Commonwealth. Based upon that inference, he properly pleaded the existence of a deal and made specific, repeated discovery requests in an effort to gather additional facts. White did not, however, have any information to indicate either that an undisclosed psychiatric report on Cruse

existed or that Juror Stinnett, Commonwealth Attorney Woodson, and Sheriff Meinhard had failed to reveal their relationships. White was therefore in no position to speculate about those issues even if he had been inclined to do so.

The court of appeals further criticized White's inability to find Cruse's psychiatric report, saying that, "[i]n light of the fact that Williams' federal counsel located the . . . [report] in this very file, state habeas counsel's failure to see the report is insufficient to demonstrate diligence." *Williams*, 189 F.3d at 426-27. But state habeas counsel's affidavit flatly states that he reviewed the file in which the report was later located, that he did not see the report, and that, had he seen the report in the file, he would have raised a *Brady* claim in state habeas proceedings based on its contents. See page 13, *supra*. It is fanciful to imagine White would have missed the report if it was in the file when he reviewed the file, since the report contains precisely the type of information White persistently sought through his formal and informal discovery requests. At a minimum, any questions his affidavit may leave concerning the presence of the psychiatric report in the file at the relevant time cannot be summarily resolved against Williams, as the court of appeals did. Rather, such questions should be answered at an evidentiary hearing where the timing of the report's placement in the state court file and its whereabouts before being placed in that file can be determined by an informed factfinder. This is the more appropriate because Cruse's psychiatric report, which is palpably inconsistent with his detailed trial testimony, should have been disclosed by the Commonwealth long before state habeas counsel was even appointed. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) ("the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable").

The court of appeals likewise found fault with state habeas counsel for not discovering Stinnett's divorce records, noting that they have been "a matter of public record since . . . 1979." 189 F.3d at 426. It said that "because

Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well." *Id*. This reasoning, again, neglects to note that before state habeas counsel ever had a duty to investigate Williams' case, Stinnett, Commonwealth Attorney Woodson and Sheriff Meinhard had an obligation – which all three breached – to alert the trial court to their relationship. Although specific questions were asked during *voir dire*, all three stood silent. It is unfair to blame White for Stinnett's, Woodson's and Meinhard's failure to reveal their connections with each other, or for their ability to avoid detection until Williams' case reached federal court.

The court of appeals further ignored the fact that federal habeas counsel only obtained Stinnett's divorce records after an investigator they retained – and White could not afford – heard two other jurors referring to Stinnett as "Bonnie Meinhard" and expressing some surprise that Stinnett had been permitted to serve. Without that chance revelation, federal counsel would never have discovered Stinnett's relationships to Meinhard and Woodson. Thus, unless appointed state habeas counsel has an obligation to investigate the domestic relations of all jurors at his or her own expense, the court of appeals' reasoning fails.

Further, under the court of appeals' rationale, the "if" clause in § 2254(e) will be rendered functionless. Given a rule that *what has been discovered now could have been discovered then*, a habeas petitioner will never get a federal evidentiary hearing. This is simply a covert strict-liability construction of § 2254(e). It ignores the critical question embodied in § 2254(e)(2)'s fault-based "If the applicant failed to develop" clause: *why* did state habeas counsel not discover evidence that was later discovered by federal habeas counsel? The answer to that question in this case lies in the silence of Stinnett, Woodson and Meinhard at trial, and in Virginia's persistent refusal to provide state habeas counsel with the basic tools necessary to ascertain all of Williams' constitutional claims and supporting facts.

The court of appeals' explanation for denying an evidentiary hearing on Williams' claim that the Commonwealth failed to reveal an agreement with Cruse is equally flawed. Citing its "overall obligation of deference to the state court system," *Williams*, 189 F.3d at 428, the Fourth Circuit relied on "unrefuted evidence" that no deal existed in order to uphold the state courts' denial of relief. *Id.* at 429. But this reasoning is perverse: the "evidence" concerning a deal between Cruse and the Commonwealth is "unrefuted" only because Williams has never been given a chance either to interview Cruse or to conduct any discovery related to Cruse's interactions with the prosecution. The district court was plainly right in recognizing that a reasonable reading of the record as a whole suggests the existence of a deal and that "Williams was entitled to know whether any informal understanding had been reached between Cruse and the Commonwealth prior to or at the time of Cruse's testimony at trial." See page 15, *supra*. To allow this reasonable inference to be dodged by characterizing the self-serving affidavits of the prosecutor and Cruse's trial counsel as "unrefuted" without allowing Williams any access to the materials or witnesses necessary to refute them is indefensible. Again, the appropriate course with respect to Williams' contention that Cruse had an agreement with the prosecution is to first give him access to the relevant parties and information and then give him a federal evidentiary hearing if the facts warrant one.

3. The court of appeals' disregard of AEDPA's policy

To hold that Williams "failed to develop" the facts supporting his claims in state court when he was rebuffed in every effort to do so would give a powerful incentive to prosecutors and state judges to obstruct prisoners' efforts to develop the facts bearing on their federal claims. As this Court explained in *Keeney*, creating incentives for federal habeas petitioners to develop the factual bases for their claims in state-court proceedings serves the interest of "channeling

the resolution of claims into the most appropriate forum." *Keeney*, 504 U.S. at 8. To achieve the appropriate channeling, it is equally important to avoid incentives for state officials to impede petitioners' access to, and ability to present, relevant evidence. If the court of appeals' analysis in this case prevails, then the less effort a state devotes to self-corrective procedures, the better protected it is against having its constitutional errors ever corrected. This cannot be right, because it is directly contrary to both the rationale of *Keeney* and Congress' purpose to increase the role of state courts in the collateral review process through passage of AEDPA. *See* 28 U.S.C. §§ 2261-2266 (making more favorable federal habeas rules available to States that provide death-sentenced prisoners with competent post-conviction counsel and necessary resources in state collateral proceedings). As Judge Easterbrook wrote in *Burris*, 116 F.3d at 259: "[T]he word 'fail' cannot bear a strict liability reading, under which . . . a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts. Nothing in § 2254(e) or the rest of the AEDPA implies that states may manipulate things in this manner."

D. There was "cause and prejudice" for Williams' procedural default.

As noted above, three of the four claims at issue in this case – the claim concerning nondisclosure of the Cruse psychiatric report, and the two claims involving Stinnett's relationships with Commonwealth Attorney Woodson and Sheriff Meinhard – were not, and cannot now be, raised in Virginia's state courts. Thus, under *Wainwright v. Sykes*, *supra*, Williams must demonstrate "cause and prejudice" to establish his right to have these claims heard on the merits in federal habeas.

1. "Cause"

This Court has defined "cause" as something "external to the petitioner, something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

"[A]lthough a 'tactical' or 'intentional' decision to forgo a procedural opportunity normally cannot constitute cause . . . , 'the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." *Amadeo*, 486 U.S. at 221-222, *quoting Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (modification by the Court). In *Strickler*, the Court found "cause" for a petitioner's failure to raise a *Brady* claim in state proceedings based on three factors: (a) the prosecution withheld favorable evidence; (b) the petitioner "reasonably relied" on the prosecution's representations that it was fulfilling its disclosure obligations; and, (c) "the Commonwealth confirmed petitioner's reliance on" those representations "by asserting during state habeas proceedings that petitioner had already received 'everything known to the government.' " *Strickler*, 119 S.Ct. at 1952.

The facts in the present record, previously discussed, are more than sufficient to establish "cause" to excuse Williams' procedural default. As in *Strickler*, Williams' counsel reasonably believed the prosecution's obligation to disclose favorable items like the Cruse psychiatric report had been discharged prior to trial. That reliance was confirmed when state habeas counsel's written request for a category of items encompassing the Cruse report was met with the representation that any such items would have been disclosed pretrial, and that the Commonwealth's representatives would not now undertake to ascertain that all such materials had in fact been disclosed. See page 9, *supra*. Likewise, the " 'factual . . . basis' " for the claims relating to Stinnett was " 'not reasonably available to counsel,' " *Strickler*, 119 S.Ct. at 1949, *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986), because Stinnett, Woodson and Meinhard failed to disclose their connections to the trial court[25] and because state habeas

[25] The hypertechnical view of the term "related" taken by Woodson and Stinnett in postconviction affidavits executed in April 1998 does nothing to mitigate the dishonesty of their failure to respond. According to the affidavits, it was self-evident that Stinnett's seventeen-year marriage to

counsel was denied the resources necessary to conduct the sort of investigation that ultimately revealed those connections during federal habeas proceedings. *Coleman*, 501 U.S. at 753. In fact, the actual discovery of the relationships between these individuals resulted from "mere fortuity," *Amadeo*, 486 U.S. at 224, made possible by federal habeas counsel's ability to finance an investigation.

Any contrary holding would have a profound adverse impact on state collateral litigation. If the Commonwealth's representations in this case do not constitute "cause," then state attorneys are rewarded for continued withholding of information establishing the existence of constitutional violations. As noted above, such an incentive runs directly contrary to this Court's habeas corpus jurisprudence and the objectives of AEDPA.

2. "Prejudice"

To establish "prejudice" relieving his procedural default, *Sykes*, 433 U.S. at 91, Williams must show that the constitutional error "worked to his actual and substantial disadvantage." *Murray v. Carrier*, 477 U.S. 478, 494 (1986), *quoting United States v. Frady*, 456 U.S. at 170. In cases of state misconduct, this showing of "prejudice" is equivalent to the showing of materiality necessary to prevail on the merits of a *Brady* claim: " 'a reasonable probability' that the result of the

Meinhard could not possibly have been viewed by an objective observer as a relationship warranting further inquiry. This determination, however, was properly reserved to the trial court, not to Stinnett, Woodson or whoever prepared their postconviction affidavits. Woodson's claim that he did not recall having represented either Stinnett or Meinhard in the couple's divorce is incredible, inasmuch as all of these people were residents of a small community where Meinhard was a law enforcement officer. Further, as a prosecutor, it was Woodson's obligation to be aware of whom he had represented, and to make that information known, when it bore upon the fairness of proceedings in which he appeared. At the very least, Williams is entitled to an opportunity to cross-examine Woodson and Stinnett concerning the self-protective assertions made in their affidavits.

trial would have been different if the suppressed document[ ] had been disclosed to the defense." *Strickler*, 119 S.Ct. at 1952.

As to the prosecution's failure to disclose the Cruse psychiatric report, Williams has clearly met this standard. He and Cruse were the only two witnesses to the killings of the Kellers. The physical evidence did not reveal who fired the fatal shots, and this was the crucial question under Virginia law. As the prosecution's witness, Cruse provided an elaborately detailed account of the shootings of Mr. and Mrs. Keller, claiming that Williams instructed him (Cruse) to shoot and that, apart from the single .357 shot which Cruse admitted he fired at Mrs. Keller, all of the shots that killed Mr. and Mrs. Keller were fired by Williams. Williams' own account of the killings directly contradicted Cruse's on the critical issue of who shot the victims. While acknowledging his participation in the other crimes that occurred before and after the Kellers' murders, he maintained that he fired only one shot – the initial shot at Mr. Keller – and that all of the other shots were fired by Cruse. The jury was thus faced with the task of determining whom to believe, Cruse or Williams.[26] Cruse's undisclosed psychiatric report could well have made a difference in the jury's credibility determination. Generated after a September 24, 1993, psychiatric evaluation, the report stated unambiguously: "[Cruse] has *little recollection* of the event, other than *vague memories*, as he was *intoxicated with alcohol and marijuana at the time*." Given this information, Williams' trial counsel could have exposed Cruse's meticulous rendition of who fired which shots at the Kellers as an utter

---

[26] Assistant Attorney General Curry has acknowledged that "[t]he issue in this case . . . was a question of which defendant shot the victim: if the jury believed Cruse's testimony, then Williams fired all five of the shots that killed Mr. Keller and two of the three shots that killed Mrs. Keller; if the jury believed Williams' testimony, then Cruse fired all three shots that killed Mrs. Keller and all but one of the shots that killed Mr. Keller. . . . In short, the issue in this case was credibility. . . . " *See* pages 10-11, *supra*.

fabrication concocted to save his own life. And because the Commonwealth's entire case for capital murder was built around Cruse's evolving story, the overall credibility of the prosecution would also have been seriously diminished once it was revealed to the jury that the Commonwealth knew, or had reason to know, that Cruse possessed no genuine memory of the details. *See Kyles*, 514 U.S. at 435 (evidence is material when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

The court of appeals was wrong in concluding that the credibility contest between Cruse and Williams was rendered irrelevant because Williams' testimony indicating that he "was at least an accomplice to the rape of Mrs. Keller, and was the first person to shoot Mr. Keller in the head" was "more than sufficient to convict him of capital murder" under Virginia law. *Williams*, 189 F.3d at 427. This is utterly at odds with the governing Virginia rule of law. Under that rule, Williams was guilty of *capital* murder only if the prosecution established that the single shot he admitted firing at Mr. Keller actually inflicted a *fatal* wound. *Cheng v. Commonwealth*, 393 S.E.2d 599, 608 (Va. 1990) ("The Commonwealth has the burden of proving beyond a reasonable doubt that one accused of capital murder was the actual perpetrator of the crime"); *id.* ("The crucial question . . . is whether all the circumstances . . . are sufficient to prove beyond a reasonable doubt that Cheng *actually fired the fatal shots*") (emphasis added).

If Cruse's testimony had been demolished by the psychiatric report, leaving only Williams' own inculpatory testimony, it would have been necessary to determine whether the shot Williams fired was fatal. That question cannot be answered on the basis of the medical examiner's testimony. The court of appeals focused on the medical examiner's statement "that each gunshot wound suffered by Mr. Keller contributed to his death." *Williams*, 189 F.3d at 427. While the medical examiner agreed with the prosecutor that "it

would be fair to say" that the shot which may have been fired by Williams[27] "contributed to the death of Morris Keller," the medical examiner explained that, in her view, "any gunshot wound, even if it might not be lethal, in and of itself [sic] is contributory." *See* page 5, n.4, *supra*. She then said that "Gunshot Wound Number Three" (to Mr. Keller's head) is "contributing and on occasion in and of itself that type of wound can be lethal, but you cannot evaluate that [in this case] because you have two other wounds that actually went into the head." *See* pages 4-5, *supra*; *see also id.* ("Q: And Shot Number Three may have been lethal, but you cannot tell, in and of itself? A: That's correct.").[28]

Given the inconclusiveness of the testimony and the absence of any other evidence establishing that the single shot

---

[27] The record does not establish which of Mr. Keller's five gunshot wounds was inflicted as a result of the shot admittedly fired by Williams. In light of the testimony by both Williams and Cruse concerning the positions of the victims relative to their assailants at the time the initial shots were fired, however, it is reasonable to assume that Williams' admitted shot produced one of Mr. Keller's three head wounds. See pages 5-6, *supra*. It is further reasonable to conclude, based upon the fact that Mr. Keller stood up after being shot by Williams, that the wound inflicted by this shot was the one designated "Shot Number Three" by the medical examiner, since that shot "passed through the face," page 6, *supra*, [Kay test. at JA 178], unlike the other two shots to Mr. Keller's head, which "passed into the brain," page 5, *supra* [Kay test. at JA 186]; see also page 5, *supra* [Kay test. at JA 179] ("Q: If [Wound Number Three] . . . was the first gunshot wound inflicted to the deceased, would it be possible for him to exercise, even after the infliction of this wound, some movement prior to the other wounds being inflicted? A: That might be possible.").

[28] Furthermore, on direct appeal the Virginia Supreme Court did not suggest that Williams was guilty of capital murder on his own testimony but, in response to his challenge to the sufficiency of the evidence as to capital murder of Mr. Keller, the court relied expressly upon Cruse's testimony. *Williams v. Commonwealth*, 450 S.E.2d 365, 376 (Va. 1994) ("even if Williams did not kill Mr. Keller on the first shot, the jury could have found that Williams did so later when, according to Cruse, Williams fired the remaining shots into Mr. Keller's body.").

Williams admitted firing was fatal, the Commonwealth's case without Cruse is not "sufficient to prove beyond a reasonable doubt that [Williams] actually fired [a] fatal shot[ ]" as required by Virginia law. *Cheng*, *supra*. And without such proof, he could be found guilty only as a principal in the second degree, subject to prosecution for first degree murder and a sentence of life in prison.[29] Under these circumstances, there exists at least " 'a reasonable probability' that the result of the trial would have been different if the [Cruse report] . . . had been disclosed to the defense." *Strickler*, 119 S.Ct. at 1952, *quoting Kyles*, 514 U.S. at 434.[30]

Furthermore, even if the jury had been able to find Williams guilty of capital murder and therefore *eligible* for the death penalty on the basis of his own inculpatory testimony, there is at least a reasonable probability that the outcome of the subsequent, *selection* stage would have been different. This Court has emphasized that "[w]hat is important at the selection stage is an *individualized* determination on the

---

[29] *See Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986) ("One who is present, aiding and abetting the actual murder, but who does not actually fire the fatal shot, is a principal in the second degree and may be convicted of no greater offense than first degree murder."); *see also* Va. Code 18.2-18 ("an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree."). In fact, Cruse was permitted to plead guilty to first degree murder as a principal in the second degree in connection with Mr. Keller's murder on the basis of his testimony that he did not fire a fatal shot at Mr. Keller. See page 8, *supra*.

[30] Moreover, the impact of the Cruse report must be assessed in the context of the evidence that a deal existed between Cruse and the Commonwealth. *See Kyles*, 514 U.S. at 436 (when assessing materiality under *United States v. Bagley*, 473 U.S. 667 (1985), "suppressed evidence [must be] considered collectively, not item-by-item"). While the jury might have expected Williams to be motivated to save himself by blaming Cruse, had the jury known Cruse had an agreement with the prosecution, it would likely have seen this as an additional factor motivating Cruse to lie. This would have enhanced Williams' credibility relative to Cruse, increasing the likelihood of a different outcome at trial.

basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). If Cruse's testimony had been discredited on the basis of the undisclosed psychiatric report, the jury's view of the "circumstances of the crime" would have been fundamentally altered: Cruse, not Williams, would have been identified as the person who fired all but one shot into the victims, and the person in all likelihood directly responsible for the deaths of both Mr. and Mrs. Keller. Giving Williams' culpability relative to Cruse in this scenario the individualized consideration required by the Eighth Amendment, it is at least reasonably probable that the jury would have returned a sentence less than death.

Williams was also prejudiced by the nondisclosure of Stinnett's relationships with Woodson and Meinhard. On *voir dire*, prospective jurors were asked whether they or any member of their immediate family had "ever been represented by" the attorneys involved in the trial, including Commonwealth Attorney Woodson. The prospective jurors were further asked if any of them were "related to" any of the individuals "who may be called as witnesses," including Deputy Sheriff Claude Meinhard. The trial court asked these questions for obvious reasons: an affirmative answer to either question would alert the court and counsel to a significant possibility of bias on the part of the prospective juror, since each question was addressed to the existence of a closer-than-arm's-length relationship between jurors and participants in the trial. *See generally* Rule 3A:14, Va. Rules of Court (enumerating questions to be asked by trial courts to identify potential bias or relations among veniremen and trial participants). As this Court has explained,

> One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' . . . *Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. . . . The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984), *quoting Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Nevertheless, neither Stinnett nor Woodson responded to the court's questions, although Woodson had in fact represented Stinnett in her divorce, and although her ex-husband (and the father of her four children) was Meinhard. Their silence flouted Williams' right to be tried by an impartial jury. In *McDonough*, the Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. Here, no lawyer having the least experience with trials could doubt that Stinnett's and Woodson's failure to alert the trial court and counsel to Stinnett's relationships constituted a failure to answer a material question honestly.[31] And while Virginia law places the decision to grant or deny a challenge for cause at the discretion of the trial court, *Stockton v. Commonwealth*, 402 S.E.2d 196, 200 (Va. 1991), the record in this case

---

[31] In April 1998, Stinnett and Woodson each made affidavits claiming that they were of the view that Stinnett was no longer "related" to Meinhard following the couple's divorce. Even if these conveniently concerted avowals were believed – as they should not be, since they have never been subjected to cross-examination, see note 16 *supra* – they are not dispositive. The questions put to Stinnett and Woodson made clear that they were seeking information bearing on potential bias, and neither Stinnett nor Woodson could plausibly have supposed that they – rather than the court – were to be the judges of their own bias. *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (the question whether to accept a "juror's protestation of impartiality" is for the trial court); *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.").

indicates that the trial judge would have been inclined to uphold a challenge by defense counsel had the facts about Juror Stinnett been revealed. For example, another prospective juror, Brenda Harris, was successfully challenged for cause by Williams' counsel on the ground that she had worked as a correctional officer at a state prison seven years prior to the trial. Direct Appeal Record at 551. The court granted this challenge in spite of counsel's acknowledgment that Ms. Harris "certainly . . . rehabilitated herself well," after revealing her former employment as a correctional officer. Direct Appeal Record at 550. Given the trial court's finding of cause for the removal of Ms. Harris, whose connections to the Commonwealth's interests were substantially more attenuated than Stinnett's, it is far more likely than not that the trial court would likewise have found cause to remove Stinnett if her relations to Deputy Sheriff Meinhard and Commonwealth Attorney Woodson had been disclosed.

Additionally, even assuming that a challenge for cause based *solely* on truthful answers to the questions asked of Stinnett would not have been granted, additional *voir dire* following up on truthful answers "would have provided a valid basis for a challenge for cause," *McDonough*, *supra*. Such questioning would have revealed the full extent of Stinnett's relations with Meinhard and Woodson, and, if conducted with any skill, would have further exposed the partiality that motivated Stinnett to conceal those relations in order to maximize her chances of being seated.[32]

At a minimum, the indicia of Stinnett's partiality contained in the present record entitle Williams to a hearing at which he has "the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. at 215. Stinnett's relationships with Woodson and Meinhard, and her failure to reveal those relationships when asked directly on *voir dire*, suggest that she was

---

[32] *See, e.g., Dyer v. Calderon*, 151 F.3d 970, 982 (9th Cir. 1998) (*en banc*) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.")

not impartial. *See McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) ("the honesty or dishonesty of a juror's response [on *voir dire*] is the best initial indicator of whether the juror in fact was impartial").[33]

In the end, Stinnett's and Woodson's failure to reveal Stinnett's true posture stripped Williams of his right to conduct meaningful, informative *voir dire*, through which he could have developed the record necessary to challenge Stinnett for cause. The hobbled *voir dire* not only prevented Williams from intelligently deciding whether to exercise a peremptory strike on Stinnett, *see Aldridge v. United States*, 283 U.S. 308, 314 (1931) (risk in denying adequate *voir dire* is "most grave when the issue is of life or death"), but deprived him of the opportunity to pursue further inquiry in order to prove that Stinnett harbored actual bias or persuade the trial court of the presence of implied bias. These deprivations undercut Williams' fundamental right to a "fair trial in a fair tribunal," *In Re Murchison*, 349 U.S. 133, 136 (1955), and thus worked to his " 'actual and substantial disadvantage.' " *Murray*, 477 U.S. at 494 (1986).

E. Guidance for the lower courts on remand

After Williams' right to a federal evidentiary hearing is recognized, this Court may wish to instruct the lower courts about the issues to be addressed at such a hearing. In this section, Williams outlines the evidentiary status of the four claims before the Court and identifies the areas where factual disputes exist.

---

[33] Stinnett's circumstances could also support a finding of implied bias. As Justice O'Connor observed in her concurring opinion in *Smith*, "there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation . . . that the juror is a close relative of one of the participants in the trial. . . . Whether or not the state proceedings result in a finding of 'no bias,' the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." *Smith*, 455 U.S. at 222.

To prevail on his two *Brady* claims, Williams must show three things: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 119 S.Ct. at 1948. Williams' first *Brady* claim centers on the psychiatric report indicating that Cruse "has little recollection of the event, other than vague memories, as he was intoxicated with alcohol and marijuana at the time." There is little need for additional evidentiary development on any aspect of this claim: the contents of the report are manifestly impeaching and favorable to the defense; the report was not turned over to defense counsel prior to trial; and the materiality of the report's contents may be determined on the basis of the existing record. In the event the Court is uncertain whether Williams has shown "cause" to overcome the procedural default of the claim, however, he should be entitled to develop and present facts corroborating his state habeas counsel's recollection that the psychiatric report was not in Cruse's court file when counsel reviewed it. *See Keeney*, 504 U.S. at 11 (remanding to allow the petitioner to "bring forward evidence establishing cause and prejudice").

Williams' second *Brady* claim, involving the Commonwealth's nondisclosure of a testimonial agreement with Cruse, does require additional factual development. As the district court noted, there is circumstantial evidence indicating that Cruse and the prosecution had some sort of formal or informal understanding that Cruse would escape the death penalty if he testified for the Commonwealth. *See* pages 14-15, *supra*. To prove that such a deal existed, however, Williams must be permitted to interview and present the testimony of witnesses, including Cruse and his attorneys, to review potentially relevant documents in the hands of the Commonwealth, and to cross-examine Cruse's attorney and the Commonwealth Attorneys concerning their affidavits.

Williams' claims involving Juror Stinnett likewise require an evidentiary hearing, at which he should be permitted to present the information now available to establish Stinnett's dishonesty in answering *voir dire* questions. He should also be allowed to develop additional evidence showing Stinnett's pattern of dishonesty on *voir dire* in order to demonstrate both that this pattern, if known to the trial court, would have resulted in Stinnett's discharge for cause, and that this pattern establishes her actual bias. *See Smith v. Phillips*, 455 U.S. at 222 ("the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias").

With regard to his claim centering on Commonwealth Attorney Woodson's failure to inform the trial court of Stinnett's connections to Meinhard and himself, Williams is entitled to develop and present evidence establishing the scope of Woodson's knowledge and the nature of his contacts with Stinnett and Meinhard. To this end, Williams should be permitted to review the prosecution's files concerning jury selection in this case for evidence of Woodson's motivations in failing to alert the trial court to Stinnett's circumstances. This information bears directly on Williams' contention that Woodson acted improperly by remaining silent when Stinnett misled the trial court, thereby violating Williams' rights to due process and a fair trial.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

*Barbara L. Hartung
1001 E. Main St., Suite 504
Richmond, VA 23219
(804) 649-1088

John H. Blume
Keir M. Weyble
1247 Sumter St., Suite 202
Columbia, SC 29201
(803) 765-1044

James E. Moore
Christian & Barton, L.L.P.
909 E. Main St., Suite 1200
Richmond, VA 23219-3095
(804) 697-4100

Counsel for Petitioner
*Counsel of Record

December, 1999

APPENDIX A

The Virginia Code Annotated provides, in pertinent part:

Article 3.

Habeas Corpus.

§ 8.01-654. When and by whom writ granted; what petition to contain. – A. 1. The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

2. A petition for writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of subsection C of this section and of § 17.1-310, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the

original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be

deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of subdivision 1 of this subsection shall be limited in subject matter to the issues enumerated in the order.

3. The circuit court shall conduct such a hearing within ninety days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within sixty days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within thirty days after the report is filed. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124; 1995, c. 503; 1998, c. 577.)

* * *

ARTICLE 1.

Homicide.

§ 18.2-31. Capital murder defined; punishment. – The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550; 1989, c. 527; 1990, c. 746; 1991, c. 232.)

* * *

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. – In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless

the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

* * *

---

(33)